1966

In the Matter of the Estate of Claudius Wallich, Deceased, Fred R. Wallich V. A. C. Wallich, et al : Reply Brief of Respondents

IN THE SUPREME COURT
of the
STATE OF UTAH

IN THE MATTER OF THE
ESTATE OF
CLAUDIUS WALLICH,
deceased,

FRED R. WALLICH,
Petitioner and Appellant,

vs.

A. C. WALLICH, et al.,
Cross-Petitioners and
Respondents.

REPLY BRIEF OF [illegible]

MARK [illegible]
E. R. SCHR[illegible]
[illegible]
Salt Lake City, Utah
Attorneys for
and Respondents

SKEEN, WORSLEY, SNOW &
CHRISTENSEN and JOSEPH L. [illegible]
701 Continental Bank Building
Salt Lake City, Utah

and

JOHN L. MACE
615 South Flower Street
Los Angeles, California
Attorneys for Appellant

[1,2] We think the lower court was correct in its interpretation. Although the italicized portion of paragraph one of the amended decree seemingly, as contended by plaintiffs, limits defendant's easement to the manner of operation of the Drainage District, viz., the number, size and location of the drains, paragraph two contains a proviso allowing for improvement and maintenance of the Drainage District as it existed on April 8, 1947, "so long as such improvement to or maintenance of the same does not materially increase the flow of water over or increase the burden to the lands of plaintiffs * * *." The word "maintenance" must relate to the number, size and location of drains existing on April 8, 1947, while "improvements" must concern something new: enlarging old or constructing new drains. Thus the test of the burden on the servient estate is in terms of the flow of water through Outlet No. 1 arising from within the limits of the Drainage District and not maintenance of the status quo as to number, size and location of the drains on the dominant estate. To interpret otherwise would treat as surplusage the word "improvements." In Salt Lake City v. Telluride Power Company, 82 Utah 607, 17 P.2d 281, 284, the court said:

> "In construing the decree, it should be construed together as a whole so as to give meaning and force to all of its terms, and, if a reasonable construction can be had which will give force to all of its wording, such a construction should be made."

[3] Moreover, it is clear that the needs of society and the concomitant policy of the law favor changes and improvements for the benefit of the dominant estate so long as the manifest intent of the parties does not disallow the changes and the burden to the servient tenement is not increased. Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 213, 174 P.2d 148, 172 A.L.R. 175; Robins v. Roberts, 80 Utah 409, 15 P.2d 340.

Affirmed. Costs to respondents.

McDONOUGH, CROCKETT, HENRIOD and WADE, JJ., concur.

IN THE SUPREME COURT
of the
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF CLAUDIUS WALLICH, deceased,

FRED R. WALLICH
Petitioner and Appellant,

vs.

A. C. WALLICH, et al
Cross-Petitioner and Respondents.

Case No. 10569

REPLY BRIEF OF RESPONDENTS

Appellant by petition invoked the jurisdiction of the lower Court to discharge him as a testamentary trustee with respect to 3,000 shares of Crown Zellerbach stock he received under that certain Decree entered February 24, 1959.

Appellant plead and based his right to be discharged upon a statute which in part provided that the Court had power to finally discharge him as trustee only after the:

> ". . . production of satisfactory vouchers that he has paid all sums of money due from him

and delivered under the order of the Court all property of the estate to the parties entitled and perform all the acts lawfully required of him . . ."

75-12-19 UCA 1954 see also Page 23 of Respondent's brief.

Nevertheless, Appellant contended he was entitled to a discharge as testamentary trustee without rendering an accounting as required by statute.

This was the first time that the issue of Appellant's to account as trustee was ever raised, and Respondent promptly objected to Appellant's being discharged without accounting to the Court as is shown by the pleadings filed.

The Court entered its order on January 28, 1966 ordering Appellant to comply with the statute he plead.

Appellant appealled from said order and based his appeal upon the fact that the lower Court erred in not permitting evidence to construe the Will and in requiring him to account and otherwise comply with the Decree of February 24, 1959.

It was not until after Respondent's brief was filed that the Appellant conceded that the Will was incorporated in the Decree of February 24, 1959, and that said Decree could not be attacked.

In Appellant's reply brief he asserted for the first time that the Court erred in ordering him to account, contending that the Decree did not require

him to account to the *Court*, and that the Will relieved him from accounting at all, and he should be discharged as trustee without accounting.

Appellant's position is erroneous for the following reasons:

1. Neither the Will nor the Decree of February 24, 1959 which incorporated said Will in it, relieved Appellant from his absolute obligation to account to the *Court* in compliance with said statute.

2. The order of the Court dated January 28, 1966 from which this appeal was taken does not require Appellant to account to any *Person* or *Party*, but anly to the Court as is compulsory under the statute Appellant plead.

3. The Court had no power to discharge Appellant as trustee until he complied with the mandate of the Legislature, namely by making a proper accounting to the Court.

4. The law is well settled that as a matter of public policy a testator has no power to relieve a trustee from his absolute obligation to render a proper accounting to the Court, and in the face of a statute expressly requiring a trustee to account, the Court cannot override the mandate of the Legislature.

See cases cited on Page 24 of Respondent's brief.

5. ESTOPPEL; Having petitioned the court for his discharge as testamentary trustee under a statute which prescribes the precise conditions under which such discharge can be granted, Appellant is estopped from asserting that the Court erred in making its order in compliance with those statutory conditions.

Respectfully submitted,

MARK & SCHOENHALS

By E. L. Schoenhals
Attorneys for Cross-Petitioner and Respondents